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No. 08-397

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BENISTAR LTD., BENISTAR EMPLOYER SERVICES TRUST CORPORATION, BENISTAR ADMIN SERVICES, INC., DANIEL CARPENTER, MOLLY CARPENTER, and CARPENTER FINANCIAL GROUP, LLC,

Petitioners,

v.

GAIL A. CAHALY, JEFFREY M. JOHNSTON, BELLEMORE ASSOCIATES, LLC, MASSACHUSETTS LUMBER COMPANY, INC., JOSEPH IANTOSCA, INDIVIDUALLY AND AS TRUSTEE OF THE FAXON HEIGHTS APARTMENTS REALTY TRUST AND FERN REALTY TRUST, and BELRIDGE CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Massachusetts Supreme Judicial Court erred in affirming a trial court's fact-bound decision to exercise personal jurisdiction over nonresident defendants based on those defendants' direct and imputed contacts with the forum state?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents Bellemore Associates LLC, Belridge Corporation and Massachusetts Lumber Company, Inc. state that they have no parent corporations and that there are no publicly held companies that own more that ten percent of their stock.

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INTRODUCTION

Petitioners have presented no "compelling reasons" for their Petition for a Writ of *Certiorari* to be granted. *See* Sup. Ct. R. 10. Specifically, the Petition should be denied because: (1) it seeks review of the factual determinations of the state court decision below; (2) Petitioners fail to demonstrate that the Massachusetts Supreme Judicial Court's May 8, 2008 decision is in conflict with a decision of this Court or a final decision of any lower court of final review; and (3) the Question Presented by the Petition does not address an important federal question that has not been settled by this Court.[1] Accordingly, Petitioners have not carried their burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

This civil action arises out of the unlawful conduct of Daniel Carpenter. The conduct giving rise to this civil action also precipitated a criminal action, which resulted in Carpenter's conviction on 19 counts of mail and wire fraud. In the civil action, the trial court determined that each of the Petitioners was subject to personal jurisdiction in the Commonwealth of Massachusetts because each had sufficient contacts with the

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[1] Insofar as the Question Presented in the Petition pertains only to those non-resident corporate defendants over which jurisdiction was based on contacts imputed to them based on the state law doctrine of piercing the corporate veil, and the Massachusetts Supreme Judicial Court affirmed the trial court's exercise of personal jurisdiction over Daniel Carpenter and Molly Carpenter based on these defendants' direct contacts with the forum state, Daniel Carpenter and Molly Carpenter are not properly named as Petitioners.

Commonwealth and the maintenance of the suit against them did not offend "traditional notions of fair play and substantial justice." The case proceeded to trial and a jury found two of the Petitioners, Daniel Carpenter and Molly Carpenter, and co-defendant Benistar Property Exchange Trust Company, Inc. ("Benistar Property" or "BPE"), liable for misrepresentation, conversion, breach of fiduciary duty, and breach of contract.

Thereafter, a jury-waived trial took place on the veil-piercing claims against the other Petitioners, Benistar Ltd., Benistar Employer Services Trust Corporation ("BESTCO"), Benistar Admin Services, Inc. ("BASI"), and Carpenter Financial Group, LLC ("CFG") (referred to collectively by the trial court as the "Phase III defendants"). Following a detailed recital of the findings of fact, the trial court held:

> (1) the blatant refusal of all the Phase III defendants to produce records supporting the legitimacy and independent existence of these corporations[15]; (2) their cynical response to the Rule 30(b)(6) depositions, shown by the choice of designees and the designees' total lack of preparation; and (3) the adverse inferences I draw from Daniel's assertion of his Fifth

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[15] It is true that there are a variety of corporate bank statements that the plaintiffs subpoenaed, but even they present some interesting questions. For example, a bank account in Benistar Ltd.'s name was later changed to be in BASI's name, with no explanation for the change being provided by the defendants.

> Amendment privilege to all questions and Molly's voluntary non-appearance as a witness, persuade me that on the record of this case, it is appropriate and necessary to disregard the corporate form with respect to Benistar Ltd., BASI, BESTCO and CFG in order "to provide a meaningful remedy and avoid injustice"[16], in this case. The plaintiffs

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[16] *Attorney General v. M.C.K., Inc.*, 432 Mass. 546, 555 (2000).

> have been awarded very substantial verdicts from the jury, commensurate with the very substantial losses they suffered at the hands of the principal defendants. Those defendants should not be permitted to escape responsibility through the misuse of the corporate form.

(SJC App. at 3154.)

The Massachusetts Appeals Court affirmed the trial court's decision, as did the Massachusetts Supreme Judicial Court. (*See* Appendices B and C to the Petition.) In denying a petition for a rehearing, the Supreme Judicial Court issued an Amended Order and Memorandum in which it stated:

> Contrary to their [Petitioners] claim, under both the Massachusetts long-arm statute and Federal law, the doctrine of piercing the corporate veil (appropriately disregarding the corporate form) may properly play a role in

> determining whether a defendant is subject to personal jurisdiction. This case is one in which piercing the corporate veil was so obviously appropriate that imputing the conduct of Benistar Trust to the other Benistar defendants is well within the range of what the law of personal jurisdiction permits.

(Pet. App. at 3a.)

With respect to Petitioners Daniel Carpenter and Molly Carpenter, the trial court found numerous contacts with the Commonwealth of Massachusetts, which satisfied the minimum contacts test required by the Due Process Clause of the Fourteenth Amendment. (SJC App. at 3154, 529-37, 541-43.)

With respect to the corporate Petitioners, Benistar Ltd., BASI, BESTCO, and CFG, the Supreme Judicial Court held that the detailed factual findings of the trial court supported the conclusion that, as a matter of state law, "the corporate form may be disregarded" and "imputing the contacts of the subsidiary with the forum state to the parent comports with due process." (Pet. App. at 9a.) The Supreme Judicial Court relied, in part, on *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) in reasoning that "[r]unning the operations of a subsidiary in Massachusetts constitutes a breadth of business activity that necessarily involves the privilege of conducting business here."

The question presented by Petitioners involves the discrete factual determinations of the Massachusetts

trial court upon which it based its determination, affirmed by the Massachusetts Appeals Court and the Supreme Judicial Court, that Petitioners were subject to personal jurisdiction based on their direct and imputed contacts with the forum state. The factually-bound decision of the Supreme Judicial Court applies the minimum contacts analysis delineated by this Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and its progeny.

STATEMENT

The Respondents are the victims of a Ponzi scheme[2] perpetrated by Benistar Property Exchange Trust Company, Inc. ("BPE") and its principals, Daniel Carpenter and Molly Carpenter. Daniel Carpenter was the president, chairman and sole shareholder of BPE. Molly Carpenter was the treasurer and managing

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[2] Ponzi schemes are a type of illegal pyramid scheme named for Charles Ponzi, who duped thousands of New England residents into investing in a postage stamp speculation scheme back in the 1920s. . . . Decades later, the Ponzi scheme continues to work on the 'rob-Peter-to-pay-Paul' principle, as money from new investors is used to pay off earlier investors until the whole scheme collapses.

U.S. Securities and Exchange Commission, *"Ponzi" Schemes, at www.sec.gov/answers/ponzi.htm* (last modified Apr. 19, 2001). Through the Benistar Ponzi scheme, the Carpenters induced the Respondents and many others to engage BPE as an escrow agent. The Carpenters then used the escrow funds to finance risky stock option trading. The Carpenters lost $8.6 million belonging to the Respondents before the illegal pyramid scheme collapsed.

director of BPE and is identified generically as a "corporate officer" on its corporate resolutions. The Carpenters were also the sole shareholders and officers of Benistar Ltd., of which BASI and CFG were wholly-owned subsidiaries. BESTCO was also owned by Daniel Carpenter, individually or with Molly. (Pet. App. at 3a.)

After the Respondents commenced this action by suing Daniel Carpenter, Molly Carpenter, BPE, and Benistar Ltd., Daniel Carpenter and Molly Carpenter submitted affidavits asserting that Molly had no affiliation with BPE or Benistar Ltd. and that Benistar Ltd. did not transact business in Massachusetts, did not intermingle funds with BPE, and had nothing to do with BPE. (SJC App. at 538.) The trial court struck the affidavits because, when Respondents "attempt[ed] to test the sufficiency of the allegations, the defendants [Petitioners Daniel Carpenter and Molly Carpenter] hid[] behind the Fifth Amendment." (SJC App. at 538.) The trial court ruled that Daniel and Molly Carpenter could not "state their account of the 'facts' only when they wished to do so, and then at the same time shield this account from scrutiny by invoking the Fifth Amendment." (SJC App. at 541.) The trial court also ruled that Molly Carpenter's assertion of her spousal privilege in addition to or in lieu of her Fifth Amendment rights did not warrant a different outcome. The trial court held: "Molly Carpenter's personal contacts with this forum do not appear to be protected under the spousal privilege." (SJC App. at 542.) After striking these affidavits, the trial court ruled that reasonable adverse inferences on the subject of their jurisdictional

contacts could be drawn from Molly Carpenter's and Daniel Carpenter's refusal to testify, though it noted, "[t]his court is not basing jurisdiction exclusively upon adverse inferences." (SJC App. at 546, n. 24.) The trial court ruled that an adverse inference could also be drawn against Benistar Ltd. based on Molly Carpenter's and Daniel Carpenter's refusal to testify because they were the owners of Benistar Ltd. (SJC App. at 556-57.)

In addition to these adverse inferences, the trial court identified a number of contacts Daniel Carpenter had with the Massachusetts forum.

> He is listed as both the chairman and secretary of Limited and Benistar. On January 3, 2001, Daniel traveled to this forum to inform [Respondent] Cahaly's husband that Cahaly's money was gone. Daniel was responsible for the management of the Massachusetts' residents' funds solicited in Massachusetts. All monies collected from Benistar went through Daniel's hands in Connecticut.

(SJC App. at 550.)

Thus, the trial court concluded that "[b]ased on his active control over Benistar, it is proper to confer jurisdiction over him. Daniel [Carpenter] was transacting business in this Commonwealth and purposefully availed himself of the privileges and protection of this forum . . . ." (SJC App. at 550.)

Regarding Molly Carpenter, the trial court found that "Molly is a named party, who refused to testify regarding her own contacts" with the forum. (SJC App. at 561.) The trial court found direct evidence of her contacts with Massachusetts, including her signature as an officer on corporate resolutions of BPE, which never contested jurisdiction in Massachusetts. In addition, the court found:

> Molly Carpenter's refusal to testify supports inferences that she was "involved in the trading of securities" with plaintiff's [sic] money; was "involved in a scheme to defraud the plaintiff;" [sic] traveled "to Massachusetts as an employee of Benistar Property;" worked as an employee "of Benistar Property" or "Benistar Limited;" personally converted the plaintiffs' money; "specifically act[ed] as an employee of Benistar Property and an employee of Benistar Limited or other Benistar entities to commit a breach of contract;" made fraudulent representations to plaintiffs as an employee of one of the Benistar entities; personally "used plaintiffs' funds for her own purposes;" and "personally traded [plaintiffs'] money." It may also be inferred that Molly Carpenter was personally involved in setting up a shell corporation and falsely stated in her affidavit that she never "exercised ownership of, dominion, or control over plaintiffs' money." Molly's signature appears in a signature block labeled "Signature of Officer" in the corporate resolutions on the Benistar account with

> PaineWebber. She was also named as a corporate officer in that document and was authorized to act on the PaineWebber account.

(SJC App. at 562.)

With regard to the Massachusetts trial court's jurisdiction over Benistar Limited, the trial judge determined, as a matter of state law, that "it is proper to draw adverse inferences [against Benistar Ltd.] based upon Daniel Carpenter, Molly Carpenter, and Martin Paley's invocation of a privilege [against self-incrimination]." (SJC App. at 557.) In addition to the inferences, the trial court found "uncontroverted evidence" of "a significant intermingling of officers, and funds between the parent, Limited, and subsidiary, Benistar, so as to warrant the exercise of personal jurisdiction over Limited." (SJC App. at 557.) To these factual findings, the trial court applied the established state law principle that "[s]ignificant exercise of control by an out-of-State parent corporation over a subsidiary and significant intermingling of officers and directors between parent and subsidiary have served to establish jurisdiction in the State where the subsidiary is conducting its business operations." (SJC App. at 556.) (Citations omitted.) The trial court found that Benistar Limited "also solicited business through their Web site," (SJC App. at 558) though it expressly noted that "[t]his court is not basing jurisdiction in this forum solely on the basis of Limited's Internet Web site." (SJC App. at 558.) It relied on the Web site "as one factor in ascertaining whether [Limited was] regularly soliciting business" in Massachusetts. (SJC App. at 558.)

With respect to personal jurisdiction over Petitioners BESTCO, BASI, and CFG, the trial court noted that [Respondents'] ability "to take discovery on the point" was impeded by "defendants' failure or refusal to comply with discovery orders of this court . . . ." (SJC App. at 641.) Nevertheless, the trial court made detailed findings of fact to support the exercise of personal jurisdiction. The court found that BESTCO, BASI, and CFG "are wholly-owned subsidiaries of Benistar Limited," are "controlled by Daniel Carpenter," and "bank statements for accounts of CFG, BESTCO, and Benistar Limited [] reflect transfers of funds between and among the new Benistar defendants [BESTCO, BASI, and CFG], Benistar Limited, Benistar Property, Daniel Carpenter, and accounts at Merrill Lynch and UBS PaineWebber." (SJC App. at 641.) These accounts were controlled by Daniel and Molly Carpenter and held in the name of BPE. The trial court also found, based on "financial statements prepared by the accountant, BASI was at all relevant times a wholly owned subsidiary of Benistar Ltd." (SJC App. at 3142.) In supporting the exercise of personal jurisdiction over BESTCO, the court also relied on "the absence of corporate documents and Trudeau's [BESTCO's designated 30(b)(6) witness] incredibly uninformed Rule 30(b)(6) testimony that BESTCO is owned by Daniel or perhaps by Daniel and Molly." (SJC App. at 3142-43.) The court found that as CFG's designated 30(b)(6) witness, Trudeau "if possible, knew even less about CFG than he did about BESTCO" and found that CFG produced no corporate documents to refute the evidence that it had sufficient contacts to support personal jurisdiction in Massachusetts. In addition to these independent factual determinations, the trial court

determined that personal jurisdiction rested "to some extent on Daniel Carpenter's invocation of his privilege against self-incrimination" in response to all questions asked of him pertaining to the contacts with Massachusetts of BESTCO, BASI, and CFG.

The Massachusetts Appeals Court affirmed the trial court's exercise of personal jurisdiction over the Petitioners. The Appeals Court held:

> [t]he record supports the judge's findings of significant contacts and substantial activities in Massachusetts by both Carpenters, including activities related to the claims asserted by the plaintiffs .... The Carpenters' activities in Massachusetts were sufficient to establish minimum contacts such that "traditional notions of fair play and substantial justice" were not offended. [Citations omitted.] .... We likewise discern no error in the judge's thorough analysis of personal jurisdiction over the Benistar corporate defendants .... Put simply, the actions of the corporations consisted of the actions of the Carpenters and of Benistar [over whom personal jurisdiction was never contested]. Because piercing the corporate veil was appropriate in this case, [footnote omitted] and because the actors beneath the veil had ample minimum contacts with the forum State, we affirm the trial judge's findings that the plaintiffs proved the jurisdictional requirements were met as to all the Benistar corporate defendants.

(Pet. App. at 65a-66a.)

On further appellate review, the Massachusetts Supreme Judicial Court issued an "amended order and memorandum address[ing] the issue of jurisdiction only." (Pet. App. at 2a.)In rejecting "[t]he fundamental argument of the Benistar defendants . . . that the determination of personal jurisdiction should be made before and not in light of the trial judge's findings on piercing the corporate veil," the Supreme Judicial Court explained, "[t]his is not the law under either the Massachusetts long-arm statute [footnote omitted] or the Due Process clause." (Pet. App. at 7a.) The Supreme Judicial Court held:

> Despite the efforts of the Benistar defendants to argue otherwise, [under] Federal due process requirements, which form the second prong of the personal jurisdiction inquiry, . . . where the corporate form may be disregarded, as it was appropriately done in this case, imputing the contacts of the subsidiary with the forum state to the parent comports with due process.

(Pet. App. at 9a.) [Citations omitted.]

REASONS FOR DENYING THE PETITION

The Petition for Writ of *Certiorari* should be denied because: (1) it seeks review of the factual determinations of the state court decision below; (2) there is no conflict between the Massachusetts Supreme Judicial Court's decision and a decision by this Court or by a final decision of any lower court; and (3) the Question Presented does not address an important issue, the resolution of which would "illuminate the character of a standard that will identify" the bounds of the Constitution.[3] Accordingly, Petitioners have not carried their burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. The Petitioners Seek Review of the State Court's Findings of Fact.

Cases in which courts have examined the exercise of personal jurisdiction over non-resident defendant corporations through facts imputed to them through their principals, parents, subsidiaries, partnerships, alter egos, related companies, companies acting as agents, and other instances in which courts are willing to pierce the corporate veil "are extremely fact dependent." 4A Charles Alan Wright & Arthur Miller, *Federal Practice and Procedures* § 1069.4, at 164-185 (3d ed. 2002) (listing cases). Petitioners Benistar Ltd., BASI, BESTCO, and CFG seek review of a trial court's factual determination, affirmed by the Massachusetts Appeals Court and the Massachusetts Supreme Judicial Court, which found them subject to personal jurisdiction

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[3] *BMW Corp. of N. Am. v. Gore*, 517 U.S. 559, 568 (1996).

based on contacts with the forum in which they were tried that were imputed to them through their principals Daniel Carpenter and Molly Carpenter and through Benistar Property.

Benistar Property did not challenge the Massachusetts courts' personal jurisdiction over it. Daniel Carpenter and Molly Carpenter were found to have sufficient direct contacts with the Massachusetts forum to establish that they "purposely availed themselves of the privilege of conducting activities here." (SJC App. at 564.) Having found that these defendants "'purposefully established minimum contacts within the forum state, the contacts [were] considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice.'" (SJC App. at 564) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)). The trial court made factual findings based on the "Gestalt factors" established by this Court in *Burger King* and concluded:

> After reviewing all the relevant factors, this court concludes that it is fair and reasonable to compel the defendants to defend themselves in Massachusetts. First, Daniel (and an adverse inference may be drawn that Molly, also) traveled to this forum on numerous occasions to conduct business. Secondly, this forum has an interest in this suit because citizens of this commonwealth have allegedly been harmed by the defendants' misappropriation of millions of dollars. This leads to the third factor, and this

court finds that it is more convenient for the resident plaintiffs to pursue this action in Massachusetts. Finally, this forum has an interest in protecting its citizens. The "Gestalt factors," taken together, weigh in favor of the plaintiffs.

The Carpenters and Limited had on-going business dealings in this Commonwealth or had specific contacts with this forum that make it not unfair for them to be subject to jurisdiction here. By initiating and executing its business transactions in the Commonwealth, the defendants have "purposefully avail[ed] [themselves] of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The defendants have "not shown that the burden placed upon it by the need to defend a suit in Massachusetts outweighs the Commonwealth's manifest interest in providing effect [sic] means of redress for its residents." *Balloon Bouquets. Inc.* [*v. Balloon Telegram Delivery, Inc.*], 18 Mass. App. Ct. at 937 (1984) (citations and quotations omitted).

Here, requiring the defendants to defend this action in Massachusetts comports with due process.

(SJC App. at 565.)

Petitioners, Benistar Ltd., BASI, BESTCO, and CFG, seek a review of the facts on which the trial court ruled, as matter of state law, "that on the record of this case, it is appropriate and necessary to disregard the corporate form with respect to Benistar Ltd., BASI, BESTCO and CFG in order to 'provide a meaningful remedy and avoid injustice, in this case.' " (SJC App. at 3154.) In their attempt to create a federal question, Petitioners conflate the state court's factual findings and the state law concept of disregarding the corporate form (also described as piercing the corporate veil). The Supreme Judicial Court found this argument unavailing and held: "Running the operations of a subsidiary in Massachusetts constitutes a breadth of business activity that necessarily involves exercise of the privilege of conducting business here. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)." (Pet. App. at 8a) (quoting *Kleinerman v. Morse*, 26 Mass. App. Ct. 819, 823 (1989)). The Supreme Judicial Court reasoned:

> Although [the parent], in its own right, lacked sufficient minimum contacts with Massachusetts to permit the assertion of jurisdiction over its corporate person, [the subsidiary] was unarguably subject to the jurisdiction of the Massachusetts courts. Hence, if [the subsidiary]'s contacts can be attributed to [the parent], then the jurisdictional hurdle can be vaulted.

(Pet. App. at 9a) (quoting *United Elec., Radio and Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1091 (1st Cir. 1992)).[4]

The Supreme Judicial Court also found "unavailing" the Petitioners "attempt to circumvent this authority

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[4] In *United Elec.*, the court explained:

> Ordinarily, courts respect the legal independence of a corporation and its subsidiary when determining if a court's jurisdiction over the offspring begets jurisdiction over the parent. *See, e.g., Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336-37, 45 S.Ct. 250, 251, 69 L.Ed. 634 (1925); *Pathe Computer*, 955 F.2d at 96; *Donatelli*, 893 F.2d at 465; *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 905 (1st Cir.1980). But, the "presumption of corporate separateness [may] be overcome by clear evidence that the parent in fact controls the activities of the subsidiary." *Escude Cruz*, 619 F.2d at 905; *accord Third Nat'l Bank v. WEDGE Group Inc.*, 882 F.2d 1087, 1090 (6th Cir.1989), *cert. denied*, 493 U.S. 1058, 110 S.Ct. 870, 107 L.Ed.2d 953 (1990); *cf. Mangual v. General Battery Corp.*, 710 F.2d 15, 21 (1st Cir.1983) ("While the parent-subsidiary relationship in itself is insufficient to justify the exercise of jurisdiction, the close relationship between the two companies is a relevant factor that may be considered."). Thus, if the record contains facts that warrant disregarding PSC's [the subsidiary's] corporate independence, the district court was entitled to find ITD [the parent] subject to personal jurisdiction in Massachusetts on the basis of its relationship with its subsidiary. *See Donatelli*, 893 F.2d at 466.

960 F.2d at 1091.

through an analogy to the purportedly 'similar' theory that was rejected in *Rush v. Savchuk*, 444 U.S. 320 (1980)." (Pet. App. at 10a.) The Supreme Judicial Court explained: "[t]hat case did not involve in any respect piercing the corporate veil, parent corporations, or subsidiaries." (Pet. App. at 10a.)

The subject Petition seeks review of the exceptionally fact-sensitive findings by the state trial court on those matters relevant to the state law principle of corporate disregard. Although these factual findings were critical to the state court's conclusion that the exercise of jurisdiction over the non-resident corporate defendants comports with the constitutional question of due process, this Court has held that "'an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question.'" *Hernandez v. New York*, 500 U.S. 352, 366 (1991) (quoting *Miller v. Fenton*, 474 U.S. 104, 113 (1985)).

II. There Is No Conflict Between the Massachusetts Supreme Judicial Court Decision for which Petitioners Seek Review and any Decision by this Court, the Courts of Appeal, or any State Supreme Court.

The United States Courts of Appeal have uniformly held that the state law doctrine of piercing the corporate veil may properly play a role in determining whether a defendant is subject to personal jurisdiction in a manner that is consistent with the due process clause. *See, e.g., United Elec.*, 960 F.2d at 1091 ("the factors that we must consider for purposes of piercing the veil separating two

corporations in the liability context also inform the jurisdictional inquiry"); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 420 (9th Cir.1977) (exercising personal jurisdiction over a non-resident corporate defendant because subsidiary acted in a manner reflecting an agency relationship between the two corporations); *Milligan v. Anderson*, 522 F.2d 1202, 1205-07 (10th Cir.1975) (same); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 492 (5th Cir.1974) (same); *Marsh v. Kitchen*, 480 F.2d 1270, 1272-73 (2d Cir.1973) (same); *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir.1983) (exercising personal jurisdiction over a non-resident corporate defendant based on a finding of control "greater than that normally associated with common ownership and directorship"); *Product Promotions*, 495 F.2d at 493 (same); *Escude Cruz v. Ortho Pharm. Corp.*, 619 F.2d 902, 905 (1st Cir.1980) (exercising personal jurisdiction over a non-resident corporate defendant because the subsidiary was merely an empty shell); *Wells Fargo*, 556 F.2d at 421 (same); *see also* 4A Charles Alan Wright & Arthur Miller, *Federal Practice and Procedures* § 1069.4, at 164-185 (3d ed. 2002) (listing cases)

Petitioners have not identified any state Supreme Court decision that is in conflict with the Massachusetts Supreme Judicial Court's decision. Consistent with the Massachusetts Supreme Judicial Court's decision, the Iowa Supreme Court held that the state law test for piercing the corporate veil for liability purposes is "overly stringent for jurisdictional purposes." *State of Iowa v. Internal Energy Mgmt. Corp.*, 324 N.W.2d 707, 714 (Iowa 1982).

Because Petitioners have failed to demonstrate a conflict between the Massachusetts Supreme Judicial Court's decision and a decision by this Court, the Courts of Appeal, or any state Supreme Court, their Petition should be denied.

III. The Question Presented Does Not Address an Important Issue.

Petitioners urge this Court to establish an unfailing test for determining the constitutional breadth of personal jurisdiction over non-resident corporations when the forum state contacts of their principals and/or related corporate entities are imputed to them. Bearing in mind that the constitutional issue is whether the forum's jurisdiction "offends traditional notions of fair play and substantial justice," this Court has held that the test is far from precise: "the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 319 (1945); *see also Burger King*, 471 U.S. at 485 ("'the facts of each case must [always] be weighed'" in determining whether the exercise of personal jurisdiction conforms with the Due Process Clause of the Fourteenth Amendment) (quoting *Kulko v. California Superior Court*, 436 U.S. 84, 92 (1978)). The subject Petition, which seeks a Writ of *Certiorari* to establish a "black and white" rule for determining the constitutional limit of the courts' personal jurisdiction over non-resident corporations ignores this Court's admonition that "any inquiry into 'fair play and substantial justice' necessarily requires determinations

'in which few answers will be written in black and white. The greys are dominant and even among them the shades are innumerable.'" *Burger King*, 471 U.S. at 486, fn. 29 (quoting *Kulko*, 436 U.S. at 92 (quoting *Estin v. Estin*, 334 U.S. 541, 545 (1948))).

In *Donatelli v. Nat'l Hockey League*, 893 F.2d 459, 466 (1st Cir. 1990), the court observed that

> if substance is not to be sacrificed on the altar of form, then actual control — an element vital to a determination of 'purposeful' establishment — should override the artifice of separate legal incorporation. To the extent that a subsidiary enters the forum state as an agent for the parent, or in circumstances where the parent is exercising unusual hegemony over the subsidiary's operations and has dictated the entry, or where the subsidiary is a separate entity in name alone, the parent has plainly made a choice to avail itself of the forum's benefices.

In the present case, the Supreme Judicial Court affirmed the exercise of jurisdiction by the trial court based on its factual findings that the contacts with the forum state of Daniel Carpenter, Molly Carpenter, Benistar Ltd., and BPE (which never contested personal jurisdiction) could be attributed to BASI, BESTCO, and CFG under the state law principle of corporate disregard. Mindful of the constitutional restraints imposed by the Due Process Clause, the Supreme Judicial Court expressly stated: "'Since the essence of personal jurisdiction is to bring responsible parties

before the court, a corporation which is actually responsible for its subsidiary's decision to undertake instate activities should, in all fairness, be within the state courts' jurisdictional reach.'" (Pet. App. at 9a-10a) (quoting *Donatelli*, 893 F.2d at 466).

In light of this Court's directive that "the facts of each case must always be weighed" in determining whether the exercise of personal jurisdiction conforms with the due process clause of the Fourteenth Amendment, Petitioners' request for an immutable standard identifying the limits of the Constitution's Due Process Clause does not present an important question of federal law that has not been settled.

CONCLUSION

Petitioners have not demonstrated any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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